

**Cusack v Mancuso**

2018 NY Slip Op 32266(U)

September 13, 2018

Supreme Court, Suffolk County

Docket Number: 13-15613

Judge: Martha L. Luft

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SHORT FORM ORDER

INDEX No. 13-15613  
CAL. No. 17-01717MM

**COPY**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**PRESENT:**

Hon. MARTHA L. LUFT  
Acting Justice Supreme Court

MOTION DATE 3-6-18  
ADJ DATE 3-6-18  
Mot. Seq. # 005 - MG

-----X  
CYNTHIA CUSACK, Executrix of the Estate of  
GERALD CUSACK, Deceased, and CYNTHIA  
CUSACK, Individually,

Plaintiffs,

- against -

PETER J. MANCUSO, D.P.M., NY FOOT &  
ANKLE SPECIALISTS, D.P.M., and  
SOUTHSIDE HOSPITAL,

Defendants.  
-----X

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Upon the following papers numbered 1 to 36 read on this motion for summary judgment: Notice of Motion and supporting papers 1-36; Answering Affidavits and supporting papers \_\_\_; Replying Affidavits and supporting papers \_\_\_; Other \_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the unopposed motion by defendant Southside Hospital for summary judgment dismissing the complaint against it is granted.

Plaintiff Cynthia Cusack, individually and as executrix of the estate of her husband, Gerald Cusack, commenced this podiatric malpractice action to recover damages for personal injuries decedent allegedly sustained due to the negligence of defendants. Plaintiff asserts causes of action against defendants for medical malpractice and lack of informed consent. The bill of particulars alleges, among other things, that defendants failed to properly treat a diabetic foot ulcer, improperly performed an achilles tendon lengthening procedure (TAL) and performed a surgical procedure that was not within the

scope of a podiatrist's authority causing decedent to undergo a below-the-knee amputation. Plaintiff further alleges that Southside Hospital is vicariously liable for the conduct of defendant Dr. Peter Mancuso.

Southside Hospital now moves for summary judgment dismissing the complaint against it on the ground that Dr. Mancuso is not an employee and, therefore, it cannot be vicariously liable for his alleged negligence. Further, the hospital argues that its treatment of plaintiff did not depart from accepted medical practice, and that it was not a proximate cause of decedent's alleged injuries. The hospital argues further that Dr. Mancuso is a private physician, and is, thus, solely responsible for obtaining decedent's informed consent. In support of its motion, the hospital submits copies of the pleadings, the verified bill of particulars, the transcripts of the parties' deposition testimony, the affirmation of Michael Trepal, D.P.M., and decedent's medical records. Initially, the court notes that the undersigned, by order dated January 10, 2018, extended Southside's time to make its motion for summary judgment.

Prior to his death, Gerard Cusack testified at an examination before trial. He testified that he was diagnosed with diabetes when he was 25 years of age, and that he treated with several doctors over the course of several years who performed monthly examinations. He testified that he checked his blood sugar levels each day, and that he presented to Dr. Peter Mancuso in 2002 after suffering from neuropathy. He testified that Dr. Mancuso gave him injections in his ankle for approximately four years, and they provided temporary relief, and that in 2009, he developed a foot ulcer. Cusack testified that Dr. Mancuso gave him a boot to wear, and that he wore it for approximately four months and limited his work schedule. He testified that the ulcer healed and he stopped wearing the boot, but another ulcer formed. He testified that he underwent a procedure on October 2, 2009 performed by Dr. Mancuso, and that he wore a cast for two months and a boot until May 2010.

Cusack testified that after the surgery he had trouble walking and his foot dragged, and that Dr. Mancuso told him that he cut the tendon too much, and that he needed to have a second surgery to shorten it. He testified that he underwent the surgery in July 2010, and that he wore a cast and a boot and utilized a walker. Cusack testified that he developed an infection and was admitted to Southside Hospital from September 8, 2010 through September 16, 2010, and was treated by Dr. Adriane Collins, an infectious disease specialist. He testified that he received antibiotics, both oral and intravenously, and that he was transferred by ambulance to Mount Sinai Hospital on September 16, 2010, where he remained until September 24, 2010. He testified that the staff at Mount Sinai conducted several tests and told him that his foot was infected, and that he received potent antibiotics during his hospitalization.

Cusack testified that he contacted Dr. Mancuso, who disagreed with Mount Sinai's opinion that he had an infection, and he transferred back to Southside Hospital on September 24, 2010 until September 30, 2010. He testified that he was treated by Dr. Mancuso and Dr. Collins, that when he was discharged he was confined to his home and a visiting nurse administered antibiotics three times per day intravenously, and that he presented to Dr. Mancuso two times per week until April 2011. He testified that on May 9, 2011, he was admitted to Plainview Hospital, as the wound was severe and infected. He was discharged on May 12, 2011 and transferred to North Shore University Hospital in Manhasset. He testified that he was discharged from North Shore University Hospital on May 20, 2011, but the wound on his left heel worsened. On May 30, 2011, he presented to the emergency department at North Shore

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University Hospital with complaints of fever and chills. Cusack testified that he was admitted to the hospital, and treated by a team of doctors which recommended that he have his foot amputated.

Cusack testified that he underwent the surgery which was performed in two stages on June 6, and on June 10, 2011, and that he was discharged from the hospital on June 14, 2011. He testified that he went to Southside Hospital for one week for rehabilitation and then went home. He testified that he subsequently underwent open heart surgery, and that he sees a kidney specialist on a monthly basis.

Dr. Peter Mancuso testified that he began treating decedent in 2002 while he worked at Twenty First Century Foot Care, and that he formed his own practice, New York Foot and Ankle Specialists, where decedent presented in October 2006. He testified that he is a board certified foot surgeon, and that he was the sole proprietor of New York Foot and Ankle Specialists until 2015, when he became a member of Prohealth which manages the practice. He testified that he employs other podiatrists, and that he is an attending physician with privileges at Southside Hospital. He testified that he sees patients six days per week, and that every Thursday he sees patients at the wound center at Southside Hospital.

Dr. Mancuso testified that he performed a foot examination on decedent on October 16, 2006, at which time he inspected his feet for ulcers, diabetic neuropathy, and arterial disease, and checked his foot pulses. He testified that decedent had complications from diabetes, namely neuropathy, foot ulcers and foot drop. Dr. Mancuso was asked about each presentation and described the physical examinations and treatments provided to decedent for infected foot ulcers, nerve pain, left foot drop, fungal nail infections and cellulitis. He testified further that he consulted with vascular surgeons and referred decedent to Dr. Anker and Dr. LaRosa, who evaluated decedent for peripheral arterial disease, and also referred him to a nephrologist.

Dr. Mancuso testified that on October 2, 2009, he performed a metatarsal head resection and Achilles tendon lengthening surgery on decedent's left foot. He testified that removing the metatarsal head reduces pressure on the wound, which prevents future ulcerations at the site. He testified further that lengthening the Achilles tendon reduces the risk of wounds on the ball of the foot. Dr. Mancuso testified that he has performed between 50 to 75 Achilles tendon lengthening procedures, and that he obtained decedent's written consent to same. He testified that it is his custom and practice to verbally inform the patient of the contents of the form and to obtain the patient's consent in front of a witness who is typically a nurse.

Dr. Mancuso testified that he instructed decedent, among other things, not to put pressure on the foot and to use a walker or crutches. He testified that decedent was ulcer free for one year and wanted to ride a stationary bike, which he strongly discouraged. He testified that decedent "begged" him to perform another Achilles procedure so that he could ride the bike. He testified that he performed the procedure in his office as decedent refused to go to the hospital. Dr. Mancuso testified that he gave decedent a Bledsoe boot, which is a non-weight bearing boot, and told decedent not to walk on it for at least four weeks. Dr. Mancuso testified that decedent returned to his office within a week after working long hours at his restaurant, and that his heel had developed an ulcer. He testified that he debrided the ulcer in his office, and that the following day, decedent complained of fever and chills so he had him admitted to Southside Hospital on September 8, 2010.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

A hospital owes a duty of reasonable care to its patients in hiring and supervising its employees and generally complies with such duty where there is evidence that it conformed to the acceptable standard of care customarily used by general hospitals (*see Salvia v St. Catherine of Sienna Med. Ctr.*, 84 AD3d 1053, 923 NYS2d 856 [2d Dept 2011]). Hospitals are vicariously liable for the acts of their employees and may be vicariously liable for the malpractice of a physician, nurse, or other health care professional that it employs under the doctrine of respondeat superior (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904 [1986]; *Bing v Thunig*, 2 NY2d 656, 163 NYS2d 3 [1957]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]). The elements of medical malpractice are a deviation or departure from accepted medical practice, and evidence that such departure was the proximate cause of injury (*see Ortiz v Wyckoff Hgts. Med. Ctr.* 149 AD3d 1093, 53 NYS3d 189 [2d Dept 2017]; *Paone v Lattarulo*, 123 AD3d 683, 683, 997 NYS2d 694 [2d Dept 2014]). Therefore, to establish medical malpractice by a hospital through its employees, expert medical testimony must be offered to demonstrate that a staff physician, resident, intern, nurse, technician, or other professional employee violated some accepted standard of good professional practice (*see Bailey v Brookdale Univ. Hosp. & Med. Ctr.*, 98 AD3d 545, 949 NYS 2d 714 [2d Dept 2012]).

Conversely, a defendant hospital moving for summary judgment must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in the defendant's treatment of the patient or that any departure was not a proximate cause of plaintiff's injuries (*see Smith v Mollica*, 158 AD3d 65, 670 NYS3d 234 [2d Dept 2018]; *Lau v Wan*, 93 AD3d 763, 940 NYS2d 662 [2d Dept 2012]; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2002]). Furthermore, to satisfy its burden on a motion for summary judgment, a defendant must address and rebut the specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 866 NYS2d 726 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 845 NYS2d 389 [2d Dept 2007]).

The affidavit Michael Trepal, D.P.M., has been submitted. Dr. Trepal states that he is a licensed, practicing podiatrist in the State of New York and is Dean and Chief Academic Officer of the New York College of Podiatric Medicine. He states that he has reviewed decedent's medical records and hospital

records from October 2, 2009 through December 31, 2010, the bill of particulars, and the transcripts of the deposition testimony. Dr. Trepal opines, with a reasonable degree of medical certainty, that the treatment rendered by the staff at Southside Hospital was in accordance with accepted hospital practice and did not cause decedent's injuries. He states that Dr. Mancuso was treating decedent for diabetic complications, including ulcerations and diabetic neuropathy, for more than 10 years, and that diabetic patients are susceptible to infections because elevated blood sugar levels weaken the immune system. He states that decedent developed recurring foot ulcers on the bottom of his left foot which became infected, and that Dr. Mancuso performed an achilles tendon lengthening procedure which is a common podiatric procedure. He states that the procedure is used to relieve pressure from the front of the foot to reduce the friction which causes foot ulcers.

Dr. Trepal states that the hospital records indicate that on October 1, 2009, decedent was examined by Dr. German, who was decedent's internist, and that he was cleared for surgery. He states that decedent also underwent pre-operative testing on September 29, 2009. Dr. Trepal describes what occurred on both appointments, and opines that they were in accord with accepted medical practice. He states that on October 2, 2009, decedent was brought to the operating room at 9:58 a.m., and he describes the procedures that were performed by Dr. Mancuso. He states that there were no complications, and that when the surgery was completed, Dr. Mancuso covered the wound with Apligraf, a wound covering made of human cells, and that he placed a dry dressing over it. He states that Dr. Mancuso was assisted by Dr. Dahlenberg, who was a resident surgeon and did not participate in the procedure.

Dr. Trepal states that at 11:11 a.m. decedent was brought to the post-operative care unit, where the nurses checked his blood pressure, color, and sedation levels every fifteen minutes until he was discharged at 12:00 p.m. Additionally, he states that the nurses checked decedent's extremities to ensure voluntary movement and circulation, and that the hospital records show decedent was stable, his toes were mobile, and his feet were warm.

Dr. Trepal addresses the allegations contained in the bill of particulars, and opines that the hospital staff timely followed the orders of Dr. Mancuso, who was a private attending physician, and that there was no indication that Dr. Mancuso was performing any procedure outside the scope of podiatry. He opines that the hospital staff properly cared for decedent, and that their post-operative care did not deviate from accepted hospital practice. He opines that the Apligraf dressing was not required to be removed by the nurses, and should not be removed, and that the nursing staff's duty was only to ensure that decedent's toes were mobile and warm.

Regarding decedent's admission to Southside Hospital on September 8, 2010, Dr. Trepal states that he was admitted at the direction of Dr. Mancuso, who treated him a day earlier for a foot ulcer which became infected. He states that decedent was admitted and diagnosed with cellulitis, and that he was treated with Zosyn and Vancomycin. He states that a magnetic resonance imaging examination was conducted, and that the results indicated that decedent's left foot did not have osteomyelitis. He states that decedent was treated by various specialists, and opines with a reasonable degree of medical certainty, that the hospital's staff did not depart from accepted medical practice. Dr. Trepal discusses the events of decedent's admission to Southside Hospital on September 26, 2010 and up until December 31,

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2010. However, the bill of particulars does not allege any negligence by the hospital staff during those dates. Additionally, Dr. Trepal opines that the hospital staff was not under a duty to obtain decedent's informed consent, as it was the sole responsibility of Dr. Mancuso to obtain such consent.

Here, Southside Hospital established, prima facie, that Dr. Mancuso was a private attending physician who was not an employee of the hospital (*Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 149 AD3d 1127, 53 NYS3d 166 [2d Dept 2017]; *Doria v Benisch*, 130 AD3d 777, 14 NYS3d 95 [2d Dept 2015]). The mere status as an attending physician is insufficient to impute any negligence on the part of Dr. Mancuso to the hospital (*Hill v St Clare's Hosp.*, 67 NY2d 72, 499 NYS2d 904). A hospital is not vicariously liable for the malpractice of an independent physician retained by the patient (*Cynamon v Mount Sinai Hosp.*, 163 AD3d 923, 2018 NY Slip Op 05448 [2d Dept 2018]). Nor can a hospital be vicariously liable for a patient's injuries where its employees merely carry out orders of the private physician unless the orders are clearly contraindicated by normal practice or the staff has committed independent acts of negligence (*id.*)

Dr. Mancuso testified that he had been treating plaintiff for over ten years, and the surgery was an elective procedure to prevent ulcerations and foot drop. Nothing in the record indicates that plaintiff believed Dr. Mancuso was acting on behalf of the hospital. Southside Hospital also established, prima facie, that Dr. Mancuso was qualified, as per his testimony regarding his experience and credentials and there being nothing in the record to indicate otherwise.

Further, Southside Hospital established, prima facie, that its treatment of plaintiff did not depart from accepted medical practice and was not a cause of plaintiff's alleged injury. In addition, the evidence submitted by the hospital establishes that plaintiff was informed of the risks of the surgery and of the alternatives to surgery, and that he expressly gave his consent to the surgery. More importantly, the hospital does not have a duty to obtain plaintiff's consent, as he was treated by his private physician, Dr. Mancuso (*Cynamon v Mount Sinai Hosp.*, 163 AD3d 923; *Doria v Benisch*, 130 AD3d 777, 14 NYS3d 95; *Salandy v Bryk*, 55 AD3d 147, 864 NYS2d 46 [2d Dept 2008]). Having met its burden, the hospital shifted the burden to plaintiff to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Dixon v Chang*, 163 AD3d 525, 79 NYS3d 648 [2d Dept 2018]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176). As no opposition papers were submitted by plaintiff, the motion of Southside Hospital for summary judgment dismissing the complaint against it is granted.

Dated: September 13, 2018

  
A.J.S.C.  
HON. MARTHA L. LUFT

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION